Supreme Court, U.S.
FILED
FEB 9 1999
CLERK

No. 98-972

In the Supreme Court of the United States

OCTOBER TERM, 1998

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

Of Counsel:

W. STEPHEN CANNON
PAMELA G. PARSONS
TERI C. MILES
Circuit City Stores, Inc.
9954 Mayland Drive
Richmond, Virginia 23233
(804) 527-4000

ANDREW L. FREY*
KENNETH S. GELLER
DONALD M. FALK
MARK S. DAVIES
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

**Counsel of Record*

Counsel for Respondent

34 pp

QUESTIONS PRESENTED

In this case, in which the consolidated claims of several individual plaintiffs were tried, petitioners prevailed on only three of their 46 claims of employment discrimination in connection with promotions at Circuit City's 3,500-person headquarters. However, the jury was also permitted to find that Circuit City engaged in a "pattern or practice" of discrimination in promotions because its decision-making was decentralized and "excessively" subjective. The petition presents the following questions:

1. Whether the court of appeals correctly held that the district court did not abuse its discretion in decertifying a class composed of employees who sought damages based on promotion decisions made by numerous different supervisors and managers and involving widely differing positions.

2. Whether the court of appeals erred in modifying a sweeping injunction entered in reliance on a free-standing finding of a "pattern or practice" of discrimination, when only individual causes of action challenging separate promotion decisions made on a decentralized basis by different decision-makers were being adjudicated, the vast majority of which were found not to involve discrimination.

3. Whether the court of appeals correctly determined that petitioners' statistical study was not sufficient to carry their burden of demonstrating that Circuit City had offered pretextual reasons for particular promotion decisions.

4. Whether evidence that is only minimally sufficient to support a finding of discrimination necessarily also suffices to support imposition of punitive damages under 42 U.S.C. § 1981.

RULE 29.6 STATEMENT

Circuit City Stores, Inc., has no parent company or non-wholly owned subsidiary, but has two series of common stock. Circuit City Group common stock tracks the performance of Circuit City Stores, Inc., while CarMax Group common stock tracks the performance of CarMax Auto Superstores, Inc. CarMax Auto Superstores, Inc., is a wholly owned subsidiary of Circuit City Stores, Inc., which has retained an equity interest in CarMax Group common stock.

TABLE OF CONTENTS

Page

STATEMENT 1

ARGUMENT 10

I. THE FOURTH CIRCUIT'S AFFIRMANCE OF THE DISCRETIONARY DECERTIFICATION OF THE PLAINTIFF CLASS PRESENTS NO GROUND FOR REVIEW 11

II. THE FOURTH CIRCUIT'S MODIFICATION OF THE INJUNCTION IN THIS CASE PRESENTS NO BASIS FOR FURTHER REVIEW .. 16

III. THE FOURTH CIRCUIT CORRECTLY HELD THAT PETITIONERS' STATISTICAL EVIDENCE DID NOT RAISE A TRIABLE ISSUE OF PRETEXT 22

IV. THE FINALITY OF THE FOURTH CIRCUIT'S CORRECT DISPOSITION OF THE PUNITIVE DAMAGES CLAIM SHOULD NOT BE DELAYED 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) ... 18

Alliance to End Repression v. *Rochford*, 565 F.2d 975 (7th Cir. 1977) ... 16

Allison v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) ... 13, 15-16

Amchem Products, Inc. v. *Windsor*, 117 S. Ct. 2231 (1997) ... 14-15

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) ... 14

Bazemore v. *Friday*, 478 U.S. 385 (1986) ... 23-24

Carman v. *McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997) ... 23

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) ... 26

Cox v. *American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), cert. denied, 479 U.S. 883 (1986) ... 19

East Texas Motor Freight Systems v. *Rodriguez*, 431 U.S. 395 (1977) ... 12

Elliott v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977), aff'd in part and rev'd in part *sub nom.* *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) ... 16

Evans v. *Harnett County Board of Education*, 684 F.2d 304 (4th Cir. 1982) ... 18-19

TABLE OF AUTHORITIES — Continued

Page

Forbush v. *J.C. Penney Co.*,
994 F.2d 1101 (5th Cir. 1993) 15-16

Forehand v. *Florida State Hospital*, 839 F. Supp. 807
(N.D. Fla. 1993), aff'd in part and rev'd in part,
89 F.3d 1562 (11th Cir. 1996) 19-20

Franks v. *Bowman Transportation Co.*,
424 U.S. 747 (1976) 18

General Telephone Co. v. *Falcon*,
457 U.S. 147 (1982) 12, 14

Harris v. *L&L Wings, Inc.*, 132 F.23 978
(4th Cir. 1997) 26

Jackson v. *Motel 6 Multipurpose, Inc.*,
130 F.3d 999 (11th Cir. 1997) 13

Kolstad v. *American Dental Ass'n*, No. 98-208 25-27

Lewis v. *Casey*, 518 U.S. 343 (1996) 17

McDonnell Douglas Corp. v. *Green*,
411 U.S. 792 (1973) 10, 20, 26, 27

Meyer v. *Brown & Root Construction Co.*,
661 F.2d 369 (5th Cir. 1981) 18

Norris v. *Frame*, 585 F.2d 1183 (3d Cir. 1978) 16

Penland v. *Warren County Jail*,
797 F.2d 332 (6th Cir. 1986) 16

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 11, 15

TABLE OF AUTHORITIES — Continued

Page

Sheet Metal Workers v. *EEOC*, 478 U.S. 421 (1986) 18

Smith v. *Wade*, 461 U.S. 30 (1983) 26

Teamsters v. *United States*, 431 U.S. 324 (1977) 18, 19-20, 21

United States v. *Paradise*, 480 U.S. 149 (1987) 18

Valentino v. *United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982) 24

Wisniewski v. *United States*, 353 U.S. 901 (1957) 16

Statutes

42 U.S.C. § 1981 ..... 8, 19, 25

42 U.S.C. § 1981a(b)(3) 25

42 U.S.C. § 1983 26

Fed. R. Civ. P. 23 ..... 11, 14

Fed. R. Civ. P. 23(b)(2) 13-16

Fed. R. Civ. P. 23(b)(3) 13, 15-16

Miscellaneous

Albert, *Human Resources Profit Power: Human Resources, Financial Growth Linked*, 67(2) PERSONNEL 47 (1990) 2

Pilkington, *Manufacturing Strategy Regained: Evidence for the Demise of Best-Practice*, CALIF. MGMT. REV., Fall 1998, at 31. 4

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-972

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

Petitioners go to great lengths to obscure the hollowness of their case. Petitioners were never able at trial to identify any discriminatory policy or practice at Circuit City headquarters, where the racial composition of the workforce belied any claim of systematic discrimination. Instead, petitioners contended that the company's decentralized, non-bureaucratic approach to promotions permitted individual supervisors to engage in specific acts of intentional discrimination in making promotions for widely varying positions. Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred, however, or that the absence of rigid promotion criteria had caused any discrimination to take place. They now seek to enlist this Court in their effort to bypass their burden of proof.

1. Respondent Circuit City Stores, Inc., operates a chain of retail consumer electronics stores. At the time of trial, Circuit City employed approximately 3,500 people at its headquarters, about 800 of whom were African-Americans. Pet. App. 4a. The headquarters is organized into about a dozen

divisions and subdivisions and more than 100 departments. C.A. App. 1858, 2948. Hundreds of headquarters employees work for a subsidiary, First North American National Bank ("FNANB"), which has its own human resources department and policies. *Id.* at 2216, 2684-2686; Pet. App. 4a.

Circuit City has grown quickly. To keep pace with that growth, Circuit City, like other companies in similar circumstances, has implemented personnel practices that limit regimentation and bureaucracy and give managers and employees wide freedom of action. Pet. App. 5a; C.A. App. 2680-2681. Thus, Circuit City does not use written job descriptions; jobs change too quickly. C.A. App. 2688. Employees are regularly evaluated, however, and promotions are based on several factors, including performance, experience, time in position, and education. See *id.* at 1629-1633, 1819-1820, 1853, 2213, 2874-2875, 2951-2953.

For promotions as for many other functions, Circuit City places most if not all responsibility on the immediate supervisor. C.A. App. 2202-2204, 2682. As the Fourth Circuit noted, this policy of decentralized decisionmaking has "strong support among management experts." Pet. App. 5a. Indeed, such "[n]onbureaucratic forms of organization and management" are "hallmarks of rapid-growth companies." Albert, *Human Resources Profit Power: Human Resources, Financial Growth Linked*, 67(2) PERSONNEL 47 (1990). This flexibility in hiring and promotions is linked to a clear non-discrimination policy, in support of which Circuit City requires supervisors to attend a week-long seminar that instructs them in appropriate, non-discriminatory management practices. See Pet. App. 5a.

Circuit City's policies have produced a racially diverse workforce at headquarters. Undisputed evidence showed that, "for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indicate." Pet. App. 6a. For example, within the "Officials and

Managers" category, over 9% of Circuit City's 375 hires between 1992 and 1995 were African-Americans, while the relevant pool was only 4% African-American. *Ibid.* It also was undisputed that, during the relevant period, the 178 promotions received by African-Americans amounted to 18% of all promotions at Circuit City headquarters, and, even more significant, 25% of promotions in which both blacks and whites were in the candidate pool; during the same period, the average proportion of African-Americans in the full-time workforce was about 19%. C.A. App. 1854-1855, 2962.

2. Despite these circumstances, petitioners' counsel spent 30 months vigorously recruiting clients for a class action against Circuit City from the more than 1,500 African-Americans who worked at headquarters between 1992 and 1995. See C.A. App. 230-231. The cases that were consolidated into this action in the Eastern District of Virginia asserted 50 instances of alleged discrimination in hiring, transfers and promotions at Circuit City headquarters; the nine petitioners accounted for 46 of the 50 claims. Pet. App. 13a. Petitioners alleged that Circuit City's failure to use more formal and centralized personnel procedures amounted to a "pattern or practice" of racial discrimination under both disparate impact and disparate treatment theories.

The district court initially certified a mandatory, non-opt-out class comprising all African-Americans who had been employed at Circuit City headquarters after April 1992. Pet. App. 14a. Having certified the class, the district court effectively prevented Circuit City from marshaling evidence from the many African-Americans who *had* been promoted, in order to counter petitioners' claim that Circuit City engaged in pervasive discrimination. Thus, Circuit City's counsel were not allowed to communicate about the litigation with *any* of the company's African-American employees, whether or not they claimed to have suffered discrimination, except with prior consent of class counsel or the district court. *Id.* at 36a-37a. The district court refused to lift its gag order except as to

persons involved in particular decisions challenged by a named plaintiff, to one plaintiff's current supervisor, and to the secretary for the in-house lawyers responsible for the case.

Petitioners proposed a seven-phase trial plan. Pet. App. 105a-107a. After considering this proposal, the district court *sua sponte* decertified the class, noting "problems of fairness and efficiency." *Id.* at 14a. Nonetheless, the court continued to bar Circuit City from trying to contact sympathetic African-American employees. See C.A. App. 618. The district court also granted summary judgment against three petitioners on all their claims. Pet. App. 16a.

When the trial began, the district court reminded the parties that the case was "no longer a class action" (C.A. App. 2042) and "re-emphasized the procedural posture of the case, stating that '[t]his is a case involving six individual plaintiffs. . . . Don't misunderstand.'" Pet. App. 16a. Petitioners were permitted to introduce evidence of a "pattern or practice" of discrimination to support their individual claims. *Id.* at 6a. In fact, however, petitioners could not point to any particular offensive practice. They instead insisted that "Circuit City's insufficiently regimented management practices" (*id.* at 16a) had made "individual cases of discrimination possible" (*id.* at 110a) in a context in which dozens of supervisors were choosing whom to promote to dozens of widely dissimilar positions.

To support this conjecture, petitioners presented a diversity consultant who testified that Circuit City's non-bureaucratic style did not comport with his view of the "best practices," in part because supervisors could rely on subjective as well as objective criteria in choosing whom to promote.[1] C.A. App.

---

[1] Although the consultant's testimony (and part of the decree that was modeled on that testimony, see Pet. App. 87a) transplanted to personnel procedures an academic fad for "best practices" in manufacturing operations, such centralized, one-size-fits-all solutions have not stood the test of time. See Pilkington, *Manufacturing Strategy Regained: Evidence for the Demise of Best-Practice*, CALIF. MGMT.

1031, 2726-2732, 2779-2782. In the opinion of this "expert," one of Circuit City's shortcomings was its failure to hire a full-time diversity specialist of its own. See *id.* at 2775-2777. The diversity consultant conceded that there was no "empirical evidence" that the practices he favored would produce less discrimination than Circuit City's system. *Id.* at 2816-2817.

Petitioners also presented a statistical study that failed to control for education, performance, or job experience. See Pet. App. 35a-36a; C.A. App. 1015, 2600, 2608-2609. The district court shielded the statistician's testimony from effective cross-examination, however, by refusing to permit access to the data runs, computer programs, and codes on which the testifying expert's opinions were constructed, on the theory that the materials were prepared by other, non-testifying experts and therefore were not discoverable. C.A. App. 509; see Pet. App. 38a-39a.

In addition, petitioners relied on certain "assumption[s]" made by two amateur surveys, along with a selection of hearsay records of employee complaints received in the course of the surveys. Pet. App. 7a-9a. One of the surveys was limited to FNANB, while the other related only to the retail stores and had nothing to do with headquarters. Petitioners also testified about a few discriminatory stray remarks that were not related to any contested promotion decision and that the declarants denied making. And petitioners paraded 17 non-plaintiff employees into court who testified to their subjective belief that various workplace disappointments resulted from discrimination. See *id.* at 16a-17a.[2]

REV., Fall 1998, at 31.

[2] Circuit City demonstrated the legal insufficiency (and irrelevance) of the anecdotal complaints in its opening brief to the court of appeals (at 25-26). Petitioners and their anecdotal witnesses challenged promotions in a dizzying array of clerical, professional, and management positions: account representative, accounting clerk, return check processor, assistant supervisor of collections, assistant supervisor of

Even in their own, carefully selected individual cases, however, petitioners had great difficulty proving that the discrimination supposedly made possible by Circuit City's "insufficiently regimented" procedures actually had occurred. Indeed, the district court granted Circuit City judgment as a matter of law on the claims of three petitioners at the close of the plaintiffs' case. Pet. App. 17a.

At the end of the trial, the district court instructed the jury to decide "first of all" whether Circuit City had engaged in a "pattern or practice" of discriminatory promotions *before* considering whether the three remaining petitioners had established *any* of their individual discrimination claims. C.A. App. 3125-3126; Pet. App. 18a. The district court intended this interrogatory to support a species of one-way class action. If the jury returned a "finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials." Pet. App. 16a. On the other hand, a verdict for Circuit City on the "pattern or practice" question would not affect future litigation brought by non-parties.

Presented with the separate "pattern or practice" interrogatory as a preliminary step to finding liability in any individual case, see Pet. App. 18a, the jury found a "pattern or practice" in the abstract — but then rejected 12 of the 15 concrete claims of discrimination that were before it, including both of petitioner McKnight's claims. See *ibid.* The jury found that, in three instances, Circuit City had discriminated by promoting other women ahead of petitioners Lowery and Peterson, and it awarded a total of $16,700 in back pay and compensatory damages. After being instructed that the "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability

---

various customer service functions, media assistant, project coordinator, graphic artist, financial reporting analyst, supervisor, and manager.

for punitive damages" (C.A. App. 3121), the jury awarded a total of $272,000 in punitive damages. *Ibid.*

After trial, the district court entered judgment for Circuit City on petitioners' disparate impact claim, holding that they had failed to identify any "specific elements" of Circuit City's promotion practices that "ha[d] a significant disparate impact on African-American employees." C.A. App. 706 (omitted from petitioner's appendix). In an unprecedented procedural innovation, however, the district court relied on the jury verdict to enter a free-standing "judgment" (also omitted from petitioners' appendix) that Circuit City had engaged in a "pattern or practice" of *intentional* discrimination. *Id.* at 700.

Based on that "judgment," the district court ordered Circuit City to restructure personnel procedures at headquarters along the lines suggested by petitioners' diversity consultant. The sweeping decree broadly prohibited Circuit City from "taking any adverse employment action against any African American employee" and required Circuit City to hire specialists in employment diversity, to adopt race-based mentoring programs, to engage in detailed record-keeping (to be measured against *de facto* quotas), and to submit to continuing oversight by petitioners' counsel and experts, as well as by the court itself. See Pet. App. 19a-20a; 80a-88a. The district court also ordered specific relief for petitioner Lowery (petitioner Peterson having left Circuit City), and awarded petitioners' counsel nearly $4 million in attorneys' fees and costs. See *id.* at 21a.

3. The Fourth Circuit stayed the decree pending appeal, except for the injunctive provisions specific to Lowery. Pet. App. 21a. On the merits, a unanimous panel (Murnaghan, Wilkins, and Hamilton, JJ.) affirmed in part and vacated in part.

The court of appeals affirmed the district court's decision to decertify the purported class, rejecting petitioners' argument that the district court somehow had "los[t] its discretion" to do so. Pet. App. 22a. Observing that "efficiency is one of the primary purposes of class action procedure," *id.* at 24a n.5, the

court of appeals held that the district court appropriately exercised its discretion to decertify the purported class based on "legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City." *Id.* at 24a.

The court of appeals also vacated the free-standing "pattern or practice" "judgment." It acknowledged that individual plaintiffs "may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination." Pet. App. 29a. Nevertheless, "individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII" separate from their claims for relief from discrimination they themselves may have suffered. *Id.* at 26a.

The Fourth Circuit affirmed the jury verdict against petitioner McKnight and the dismissal of all claims made by six other petitioners. It explained that four of the dismissed petitioners "failed to establish a prima facie case of discrimination" (Pet. App. 32a), while the other two "failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual" (*id.* at 33a). The court held that petitioners' statistical evidence was insufficient to show pretext because the study did not "adequately control for factors other than race that could account for the disparity in promotions at Circuit City," "notabl[y]" including the effect of "educational level * * * on promotions at Circuit City." *Id.* at 35a.

Next, the court of appeals affirmed, without analysis, the judgments in favor of petitioners Peterson and Lowery. Pet. App. 36a n.7. It then held, however, that the record evidence was "simply insufficient" to prove "conduct exhibiting 'malice, an evil motive, or recklessness or callous indifference to a federally protected right.'" *Id.* at 39a, 40a. The record clearly showed "that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion." *Id.* at 40a. Those problems included Peterson's "deficient" performance "during her two rotations as assistant supervisor" (*id.* at 12a)

and Lowery's shortcomings in training recruiters, providing leadership, and coherent communication (see *id.* at 9a-10a). That evidence, which made liability borderline, rendered the "extraordinary remedy of punitive damages * * * not appropriate" in the absence of "egregious" conduct. *Id.* at 40a.

Given the very limited number of successful claims, the court of appeals substantially narrowed the district court's injunction, leaving in place only the provisions relating to petitioner Lowery. Pet. App. 40a. It vacated the extensive provisions mandating that Circuit City create a "Department of Diversity Management" and implement a wide variety of other programs "subject to Plaintiffs' approval, for which Plaintiffs' counsel [could] apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order." *Id.* at 41a. These "class-wide remedies" with their "labyrinthine provisions for reporting and enforcement" amounted to an abuse of discretion because they "far surpass[ed] those needed — and [we]re far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." *Id.* at 41a.

Although the Fourth Circuit recognized that "occasionally individual relief equates to class-wide relief" (Pet. App. 41a), that was not the case here, and the vacated "pattern or practice * * * 'claim'" provided no basis for "such broad and sweeping relief." *Id.* at 42a. The court also identified flaws in other parts of the decree ranging from the "go-thy-way-and-sin-no-more provision" that would "impermissibly subject[]" Circuit City "to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged" (*ibid.*), to the segregated "career development and mentoring program" for African-Americans only (*id.* at 41a-42a), to the provision that "on its face * * * would prevent Circuit City from taking" any adverse action against any African-American employee "even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory." *Id.* at 42a.

Finally, the court of appeals vacated the award of nearly $4 million in attorneys' fees and costs. It noted that "of the fifty claims filed, the Plaintiffs prevailed on only three," manifesting "a very low degree of success." Pet. App. 44a, 43a.

ARGUMENT

By no criterion does this case warrant further review. The decision below, and the questions actually presented by it, are far narrower than petitioners suggest. The Fourth Circuit's resolution of the challenged issues is correct and does not conflict with decisions of other courts of appeals. Indeed, the issues that were resolved below have received scant appellate attention. That is no surprise, for this case was characterized at the trial level by unusual legal theories and procedural rulings that have no currency elsewhere in employment discrimination law.

Petitioners alleged 46 individual acts of discrimination in promotions at Circuit City's headquarters; *43 of those claims were rejected in the district court.* Perhaps driven by necessity born of the dearth of evidence of actual discrimination, petitioners put forward a theory of "pattern or practice" discrimination, asserting that a *lack* of bureaucratic procedures — procedures that even petitioners' expert conceded had not been shown to reduce discrimination — made it *possible* for supervisors and managers scattered across a hundred departments to discriminate intentionally when filling hundreds of vastly different jobs.

The court of appeals correctly rejected petitioners' unprecedented attempt to rely on that "pattern or practice" to avoid their burden of proof under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and to restructure Circuit City's entire promotion system. Instead, it provided the two petitioners actually found to have suffered isolated acts of discrimination with complete make-whole damages and appropriate injunctive relief, but otherwise rejected petitioner's claims.

I. THE FOURTH CIRCUIT'S AFFIRMANCE OF THE DISCRETIONARY DECERTIFICATION OF THE PLAINTIFF CLASS PRESENTS NO GROUND FOR REVIEW

In language that typifies petitioners' seemingly ceaseless resort to hyperbole, the first question in the petition suggests that the decision below "foreclos[ed] all procedural avenues by which victims of an intentional pattern or practice of racial discrimination may obtain both class-wide injunctive relief and monetary damages." Pet. i. The Fourth Circuit did nothing of the kind. It simply held that the district court did not abuse its *discretion* when it required *these plaintiffs* to forgo the class mechanism in *this case*. Pet. App. 25a. That unremarkable and fact-bound determination presents no basis for further review.

A. This Court has emphasized that Rule 23 of the Federal Rules of Civil Procedure vests "broad power and discretion" in district courts "with respect to matters involving the certification and management of potentially *cumbersome* or frivolous class actions." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (emphasis added). The Court recognized that only "sound discretion and use of the tools available" could prevent "administrative chaos" and "class-action harassment." *Ibid.* Petitioners take issue with this view. They suggest that the Court should second-guess the Fourth Circuit's entirely unremarkable holding that, under the unusual circumstances of the disparate "class" that petitioners proposed here, the district court acted within its discretion in decertifying the class precisely because it was cumbersome and inefficient.

The petition exhaustively recites (Pet. 8-13) the history and general policy underlying employment discrimination class actions in an effort to distract the Court from the fundamental peculiarity of *this* case and the soundness of the decision below. As the Fourth Circuit recognized, the broad principles on which petitioners rely are "beside the point." Pet. App. 25a. The petition simply ignores what it cannot controvert: the disparate

plaintiffs' individual requests for significant compensatory and punitive relief would have made class treatment inefficient, unmanageable, and unfair. *Id.* at 24a-25a.

Petitioners assert (Pet. i, 19) that the decision below would prevent *any* employment discrimination plaintiff from seeking both individual damages and broad injunctive relief. That is not so. The closest thing to a common thread linking petitioners' claims was the assertion that Circuit City should have tried to make it harder for supervisors to stray into specific discriminatory actions by using an array of bureaucratic procedures of unproven and highly doubtful efficacy. Nothing in the decision below forecloses the ability, in a much different case, of a more cohesive, sensibly constituted class of discrimination plaintiffs — or, for that matter, an individual plaintiff for whom equitable relief depended on the eradication of an identifiable practice (see Pet. App. 41a) — to seek both monetary and injunctive relief.

B. Petitioners ask this Court to grant review to consider their proposition that *any* set of plaintiffs who append a prayer for employer-wide injunctive relief to their assertions of individual discrimination *must* be certified as a class. The Fourth Circuit properly rejected the view that district courts somehow "lose[] their discretion to certify or decertify [a] class" in the face of such complaints (Pet. App. 22a), and petitioners offer no support for such an extreme view here. Indeed, as the Fourth Circuit observed, this "Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification." Pet. App. 25a, citing *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155-157 (1982), and *East Texas Motor Freight Systems* v. *Rodriguez*, 431 U.S. 395, 405-06 (1977).

Petitioners do not identify a single conflicting decision by a court of appeals reviewing the class certification of discrimination plaintiffs who sought significant monetary damages as well as injunctive relief. Indeed, the only courts of appeals to

address similar attempts to misuse the class action device have likewise held that class certification is *not* mandatory, if anything taking a stronger stand against such proposals. See *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997).

In *Allison*, the Fifth Circuit affirmed a district court's refusal to certify a class of employment discrimination plaintiffs who were dispersed across multiple "skill groups" and "functional areas" and who asserted commonality based on "challenging general hiring, training and promotional policies," such as "use of subjective decision-making." 151 F.3d at 407. The Fifth Circuit affirmed the district court's exercise of its "substantial discretion in determining whether to certify a class action" (*id.* at 408), relying in part on the problems of "efficiency and manageability" presented by the proposed class (*id.* at 415). The Fifth Circuit concluded, consistently with the decision here, that class certification may be denied where a widely heterogeneous class of employees seeks both monetary and injunctive relief. *Id.* at 418. In fact, the Fifth Circuit went further than the court below, holding that in such cases injunctive relief plainly is not predominant, so that a district court would necessarily abuse its discretion if it *did* certify a plaintiff class. See *id.* at 415-418.

Likewise, the Eleventh Circuit in *Jackson* issued a writ of mandamus to decertify a class consisting of persons claiming that a motel chain discriminated against them. Although the plaintiffs in *Jackson* sought injunctive relief against a supposed "practice or policy" of discrimination as well as damages, the court did not find Rule 23(b)(2) to be even "arguably fulfilled" by such a disparate class of damages-seeking plaintiffs (130 F.3d at 1005), presumably because the injunctive relief against the alleged practice was not predominant over the damages claims (see *id.* at 1005-1006). The court revoked certification after finding that Rule 23(b)(3) also was not satisfied.

Petitioners concede that class certification may be denied whenever "monetary relief" is "predominant." Pet. 13. Yet, throughout this litigation, petitioners suggested that dozens or hundreds of class members would press damages claims. Indeed, petitioners' failed effort to extract a $15 million settlement from Circuit City (see C.A. App. 4361-4363) confirms that petitioners placed primary emphasis on the pecuniary aspects of this case. The fairness, efficiency and manageability concerns cited by the district court, and reiterated by the court of appeals, all flow from the fact that common injunctive relief did not at all predominate over the individual, damages-related issues.

Petitioners also maintain (Pet. 14, 20) that the affirmance of the district court's discretionary decertification somehow amounts to "the sort of 'judicial inventiveness' that this Court disapproved in" *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997). Petitioners turn *Amchem* squarely on its head when they attempt to make that decision, which *limited* the scope of permissible class certification, into the basis for making class certification *mandatory* whenever an omnibus damages action also asserts a claim for injunctive relief. In *Amchem* this Court forbade lower courts to *waive* the *minimum* requirements of Rule 23 in order to certify classes for settlement. Nothing in *Amchem* suggests that any case that arguably meets the requirements of Rule 23 *must* be certified as a class action regardless of the circumstances or alters the longstanding recognition that a district court should not maintain a class action that does not "advance the efficiency and economy of litigation which is a principal purpose of the procedure." *Falcon*, 457 U.S. at 159 (quoting *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 553 (1974)). To the contrary, in *Amchem* this Court reiterated the universal view that "Rule 23(b)(2) *permits*" — but does not require — "class actions for

declaratory or injunctive relief." 117 S. Ct. at 2245 (emphasis added). The decision below accorded with precedent.[3]

C. Petitioners try to manufacture a circuit conflict by insisting that the decision below allows district courts to "graft the Rule 23(b)(3) requirements" of manageability, fairness, efficiency and superiority "onto Rule 23(b)(2)." Pet. 14. Petitioners must hope that this Court will overlook the Fourth Circuit's express disavowal of any such holding: "[W]e do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes." Pet. App. 24a n.5. Rather, the court of appeals continued, in terms that echo this Court's instructions in *Sonotone*, 442 U.S. at 345, that "because efficiency is one of the primary purposes of class action procedure, * * * in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." Pet. App. 24a n.5.

The actual holding of the Fourth Circuit renders irrelevant the supposedly conflicting statements made by other courts of appeals in decisions, rendered outside the discrimination context, where proof of plaintiff-specific damages was *not* at issue. The feasibility of class treatment is quite different when an action seeks *only* injunctive relief, or injunctive relief combined with incidental restitutionary remedies that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415 (distinguishing *Forbush* v. *J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993)).[4] That describes the cases

---

[3] The only way in which the district court "invent[ed a] new form[] of class action[] that w[as] not contemplated by Congress" was to favor *petitioners* by creating an "alternative procedural mechanism * * * intended to give the class" — but *not* Circuit City — "approximately the same benefits as class certification." Pet. 16, 20.

[4] Petitioners claim that *Forbush* conflicts with the decision below,

cited at Pet. 19-20, in which courts said, in full accordance with the decision below, that compliance with all of the factors enumerated in Rule 23(b)(3) was not a general *prerequisite* to *eligibility* for certification under Rule 23(b)(2).[5] The asserted conflict is illusory — and at any rate has nothing to do with class actions seeking damages for an alleged "intentional pattern or practice of racial discrimination." Pet. i.

II. THE FOURTH CIRCUIT'S MODIFICATION OF THE INJUNCTION IN THIS CASE PRESENTS NO BASIS FOR FURTHER REVIEW

Petitioners suggest that because this is a civil rights case, there are no limits on the scope of injunctive relief. To the contrary, the Fourth Circuit correctly applied settled equitable principles to the unusual facts of this case in narrowing the decree to what could be justified in order to afford prevailing plaintiffs complete relief.

A. The Fourth Circuit confronted a decree that, to remedy three isolated instances of discrimination — two denying the same promotion to the same person — ordered Circuit City to "revise its program of promoting employees" throughout its hundred departments and submit to having all promotions

---

but the Fifth Circuit amply distinguished the issues in *Allison* (which track the issues in this case) from those in *Forbush*. See 151 F.3d at 415. Any tension among Fifth Circuit decisions is a matter for that court — which declined to rehear *Allison* en banc, *id.* at 434. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5] See *Penland* v. *Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) (injunctive relief for jail conditions); *Norris* v. *Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (injunctive relief for pre-trial detainees; dictum on class certification); *Alliance to End Repression* v. *Rochford*, 565 F.2d 975, 976 n.2, 979 (7th Cir. 1977) (challenge to police surveillance; damages not certified); *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977) (challenge to government benefits recoupment procedure, damages not awarded), aff'd in part and rev'd in part *sub nom. Califano* v. *Yamasaki*, 442 U.S. 682 (1979).

evaluated against a *de facto* quota; to create and staff a "Department of Diversity Management"; to comply with "labyrinthine provisions for reporting and enforcement"; to submit "[m]any aspects of the new programs * * * to Plaintiffs' approval"; and to pay "Plaintiffs' counsel * * * quarterly for fees and expenses incurred in the monitoring and enforcement of the order." Pet. App. 41a, 83a-87a. The Fourth Circuit's catalogue of these and other astounding aspects of the decree speaks for itself. See *id.* at 40a-42a.

Petitioners provide no sound reason for this Court to second-guess the Fourth Circuit's unremarkable conclusion that "such sweeping remedies far surpass those needed — and are far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." Pet. App. 41a. Indeed, there was *no* showing at trial that a lack of bureaucratic procedures at Circuit City actually caused any discrimination, or that the imposition of such procedures would reduce it. The Fourth Circuit's approach is completely in line with this Court's jurisprudence unequivocally limiting injunctive relief to the scope necessary to remediate "the injury-in-fact that" a private "plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Certainly, as this Court held in *Lewis* — which *was* a class action — "two instances of actual injury" do not warrant system-wide injunctive relief, *id.* at 356, no matter how broadly the offending "practice" may be characterized.[6]

The petition quotes (at 26) a misleading patchwork of broad statements about make-whole relief and suggests that the court of appeals' decision to narrow the unprecedented injunction in this weak case somehow conflicts with decisions of this

---

[6] Petitioners prudently do not contest the Fourth Circuit's disposition of some of the more extreme elements of the decree, such as the effort to convert the entire corpus of federal civil rights legislation into the basis for contempt proceedings against Circuit City, the race-specific mentoring program, and the forbidding of *any* adverse action against *any* African-American employee. Pet. App. 41a-42a.

Court. In a few government cases and class actions, this Court has upheld system-wide remedies altering specific, identified practices with specific discriminatory effects, such as the seniority systems modified in *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976). Petitioners — who could never pinpoint an enjoinable practice that had a discriminatory effect — can identify no precedent that approaches the breadth and intrusiveness of the injunction narrowed by the Fourth Circuit here.

Not only was the relief in each of the cited cases more closely tailored to the violations at hand, but those cases bore no resemblance to this one. By contrast with petitioners' case, which relied on shaky statistics to support a theory that insufficiently regimented personnel practices permitted individual decisionmakers to discriminate in individual instances, the decisions of this Court on which petitioners rely involved years of "overt segregation," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409 (1975), and "longstanding or egregious discrimination" including contemptuous resistance to prior anti-discrimination decrees. *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 448 (1986); see *United States* v. *Paradise*, 480 U.S. 149, 153 (1987). In the circumstances of this case, the Fourth Circuit appropriately limited the decree to an "award [of] make-whole relief to the individuals" who were provably "victimized." *Sheet Metal Workers*, 478 U.S. at 448.

B. Incredibly, petitioners claim (Pet. 27) that the decision below conflicts with a dictum in *Meyer* v. *Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). In *Meyer*, the Fifth Circuit reversed the *entire* injunction at issue (*id.* at 374), but stated that in some other, hypothetical cases "injunctive relief designed to assist a party will accidentally assist persons not before the court" (*ibid.*). Likewise, the Fourth Circuit explicitly acknowledged that, when a specific, identifiably discriminatory practice has injured an individual plaintiff, "individual relief equates to class-wide relief," Pet. App. 41a, and prior decisions have taken that tack. *E.g.*, *Evans* v. *Harnett County*

Board of Education, 684 F.2d 304, 306 (4th Cir. 1982) (relief awarded in individual action enjoined school district from hiring and assigning principals based on race). That was not the case here, where the injunction simply reproduced the predilections of petitioners' diversity consultant, who admitted that he had no evidence that his favored procedures actually reduced discrimination. Even if conflicting dicta could support review, there is no conflict here.

C. Petitioners suggest that the Fourth Circuit was foreclosed from vacating the more extravagant portions of the district court's decree because the jury had found a free-standing "pattern or practice" of discrimination before rejecting 12 of the 15 alleged instances of actual discrimination that were before it. The Fourth Circuit held that, although "[e]vidence of a pattern or practice of discrimination" might be probative of individual claims (see Pet. App. 29a-30a), there is no such thing as a free-standing "pattern or practice" cause of action or judgment in an individual case. Accordingly, the jury's separate finding could not justify relief broader than that appropriate for the two prevailing individual plaintiffs.

Petitioners purport to discern a conflict on this point between the decision below and a passing "thought" (Pet. 21) — *i.e.*, dictum — in *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), cert. denied, 479 U.S. 883 (1986). The Fourth Circuit accurately recognized that its holding was "not in conflict" with *Cox*. Pet. App. 31a. The Eleventh Circuit *held* in *Cox* that the plaintiff class had to be recertified (784 F.2d at 1558); only after "the plaintiff class [was] recertified" would "the trial proceed as a Title VII pattern and practice suit" (*id.* at 1562). No published decision has turned on the Eleventh Circuit's dictum (*id.* at 1559) suggesting that a presumption of discrimination under *Teamsters* (see 431 U.S. at 357-361) might apply regardless of class certification.[7] If a future court

---

[7] No "pattern or practice" was proved in *Forehand* v. *Florida State Hospital*, 839 F. Supp. 807, 813 (N.D. Fla. 1993), aff'd in part and

of appeals applies the Eleventh Circuit's "thought" (Pet. 21), there may be a "real" conflict between circuits (Pet. 22); there is none now.

Petitioners' true motivation in asking this Court to review this issue is their hope to evade their burden of proof by gaining the benefit of the presumption of discrimination that was imposed in *Teamsters*. See Pet. 18. Even the district court did not go so far as to relieve petitioners from their burden of proving that intentional discrimination had occurred in the real world, not merely in the secret statistical computations of their experts. As the Fourth Circuit observed, this "Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved *all* elements of a *prima facie* case. See *McDonnell Douglas*, 411 U.S. at 802." Pet. App. 30a.

Not surprisingly, petitioners cannot identify a single decision by a court of appeals that adopts their proposed reversal of the burdens. To the contrary, as the Fourth Circuit recognized, in the rare instances when this issue has been broached even obliquely, "[t]he relevant case law on the subject" in other courts of appeals "supports [the] conclusion" reached below. Pet. App. 31a (citing decisions from the Fifth and Seventh Circuits).

Indeed, few employment discrimination cases could be less well suited to application of the *Teamsters* presumption than this one. The presumption is designed to address the situation in which a practice of an employer operates to produce fairly consistently discriminatory outcomes. Here, there is no identifiable "practice," much less any causal relationship between practice and outcome; moreover, the record of this case, in contrast to cases like *Teamsters*, shows at most a rare incidence of discriminatory promotion decisions within Circuit City's framework of decentralized decision-making. Only by traveling

---

rev'd in part, 89 F.3d 1562 (11th Cir. 1996). See Pet. 22.

through the looking glass could one suppose that these circumstances rationally justify use of a presumption of discrimination: a facility where African-Americans, overall, have received almost exactly the proportion of promotions that their numbers in the full-time workforce would suggest, and where the proportion of African-Americans in every EEO category, including managerial positions, *exceeds* the proportion in the relevant labor pool.[8]

D. Finally, there is no merit to petitioners' suggestion (Pet. 17) that the Fourth Circuit "elevated form over substance" in holding that the decertification decision precluded the *Teamsters* presumption. Petitioners' eagerness to avoid shouldering their burden of proof is understandable in light of their dismal success rate: their 46 claims of discrimination, tested by normal legal standards, were found wanting 43 times. Petitioners' largely flimsy individual complaints may have driven them to put on still flimsier "pattern or practice" evidence. Although petitioners now try to muddy the waters (Pet. 17), the district court made unmistakably clear as the trial began that the case was "no longer a class action," but rather was "a case involving six individual plaintiffs" in which "pattern or practice" evidence would be admitted *only* to show that individual plaintiffs "were discriminated against in their specific instances." C.A. App. 2042-2043; see Pet. App. 16a. The district court also made clear that, "[w]hen all is said and done, * * * the focus" of the evidence and "the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination." Pet. App. 110a. Later at trial, petitioners

---

[8] In addition, as already noted, petitioners failed to show that discrimination in promotions occurred in 43 of the 46 instances that they hand-picked over a 30 month period for inclusion in this suit — presumably the strongest cases found among Circuit City's workforce of 1,500 African-American employees. Thus, petitioners proved no "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336.

expressly acknowledged that "this [wa]s not a class action." Tr. 1563.

Petitioners themselves invited whatever confusion resulted from their effort to distort procedural and substantive law when they tried to manufacture a "pattern or practice" of discrimination by aggregating dozens of weak and wholly separate individual promotion claims. Nothing remotely worthy of certiorari arises from the Fourth Circuit's fact-bound determination that the proof in this case did not justify the "sweeping" and "burdensome" remedies imposed by the district court. Pet. App. 41a.

III. THE FOURTH CIRCUIT CORRECTLY HELD THAT PETITIONERS' STATISTICAL EVIDENCE DID NOT RAISE A TRIABLE ISSUE OF PRETEXT

Contrary to petitioners' suggestion, there is nothing amiss in the Fourth Circuit's fact-bound determination that petitioners' statistical study did not by itself suffice to prove that Circuit City's proffered reasons for particular individual promotion decisions were pretextual. Pet. App. 35a-36a. The Fourth Circuit correctly observed that the study did not "adequately control for" several "factors" — not just "one," as petitioners would have it (Pet. i) — "other than race that could account for the disparity in promotions." Pet. App. 35a. The court of appeals focused on the study's "notable omission" of any factor accounting for the effect that "educational level had on promotions at Circuit City." *Ibid.* As the court observed, "the record is clear — and common sense dictates — that for many positions" among the dozens examined by the study "educational background was crucial." *Ibid.*[9] The study's many

---

[9] This was not a merely "potential" problem (Pet. i); rather, there was "a large disparity in the educational levels of employees." Pet. App. 35a-36a. While 55% of all headquarters employees had college degrees, only 33% of the African-American employees were college graduates. *Id.* at 35a. At FNANB, education levels were in fact a specific consideration in promotion decisions. *Id.* at 12a; C.A. App.

other shortcomings included its failure to control for "factors" such as candidates' job title, their performance record, and (for those hired after April 1992) their tenure with Circuit City. See C.A. App. 1015, 2594-2596, 2608-2609. Because Circuit City hired increasing numbers of African-Americans during this period, the average African-American had less time in her position than others in her promotion pool. See *id.* at 2595.

Petitioners do not claim that the Fourth Circuit's disposition of this issue conflicts with the holding of any other court of appeals. Indeed, the Eighth Circuit has observed that even *valid* "[c]ompany-wide statistics are usually not helpful in establishing pretext in an employment-discrimination case, because those who make employment decisions vary across divisions." *Carman* v. *McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997) (Richard Arnold, C.J.).

Moreover, contrary to petitioner's claim, the Fourth Circuit's conclusion that such blatant shortcomings "weaken[ed] the statistical study's probativeness" is entirely consistent with *Bazemore* v. *Friday*, 478 U.S. 385 (1986). First, *Bazemore* addressed admissibility, not independent sufficiency to prove a particular element of particular plaintiffs' case (see *id.* at 400); the Court recognized, however, that "some regressions" may be "so incomplete as to be inadmissible as irrelevant" (*id.* at 400 n.10). Second, the *Bazemore* study *did* measure education, tenure, and job title. *Id.* at 399. Because the study accounted for these "major factors" (*id.* at 400), it was admissible even though it did not account for "*all* measurable variables thought to have an effect on salary level." *Id.* at 399. By contrast, petitioners' study did not adequately account for *any* of the "major factors" identified in *Bazemore*. The Fourth Circuit's conclusion that such gross deficiencies fatally

---

1850-1851. Ironically, the primary evidence urged by petitioner Lowery in support of her successful claim of discrimination was that she had better educational credentials than the woman who received the promotion at issue. See Pet. App. 10a.

"weaken[ed] the statistical study's probativeness" (Pet. App. 36a) accords with the holding in *Bazemore* that failure to include even *minor* variables "will affect the analysis' probativeness." 478 U.S. at 400. See also, *e.g.*, *Valentino* v. *United States Postal Service*, 674 F.2d 56, 68-71 (D.C. Cir. 1982) (Ruth Bader Ginsburg, J.) (rejecting deficient regression study).

At bottom, petitioners ask this Court to grant review to address what they claim is the Fourth Circuit's "misunderstanding of the record." Pet. 25. As it happens, the Fourth Circuit, if anything, understated the shortcomings of petitioners' efforts at statistical legerdemain.[10] In any event, petitioners' fact-bound disputes with the Fourth Circuit's assessment of the evidence are of no broader significance, and present no issue for this Court's review.

IV. THE FINALITY OF THE FOURTH CIRCUIT'S CORRECT DISPOSITION OF THE PUNITIVE DAMAGES CLAIM SHOULD NOT BE DELAYED

In a last-ditch effort to forestall the final disposition of this case, petitioners ask the Court to review the Fourth Circuit's reversal of the award of punitive damages. Petitioners say that this last issue warrants review in light of the grant of certiorari

---

[10] Petitioners' statistics (and their expert's conclusion) were fishy, to say the least, in light of the undisputed showing that the proportion of promotions going to African-Americans approximated their proportion in the work force, while the proportion of management positions held by African-Americans exceeded the proportion in the relevant labor pool. See pp. 2-3, *supra*. To conjure up racial discrimination, petitioners' study assumed that every employee was eligible for every promotion throughout the hundred departments at headquarters, purporting to use multiple regressions to filter out every factor unrelated to race but entirely failing to control for the most obvious factors. C.A. App. 2589-2590, 2598-2599, 2947. Petitioners' effort to paper over these shortcomings (Pet. 24-25) improperly and misleadingly relies on voir dire material that was not admitted into evidence.

in *Kolstad* v. *American Dental Ass'n*, No. 98-208. In *Kolstad*, this Court will determine what circumstances justify an award of punitive damages under Title VII, which authorizes punitive damages upon proof that the defendant "engaged in a discriminatory practice * * * with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Because that explicit statutory standard largely codifies the common-law standard for awarding punitive damages under 42 U.S.C. § 1981, see, *e.g.*, Pet. App. 39a, the decision in *Kolstad* will guide the courts of appeals in applying the standard for punitive damages under Section 1981 as well. Contrary to petitioners' suggestion, once *Kolstad* has been decided there will be no reason to revisit the similar issue in this case.

There also is no sound reason to delay disposing of the present petition. If this Court affirms the *en banc* D.C. Circuit in *Kolstad*, the ruling below on punitive damages plainly would be valid. Under any plausible resolution of *Kolstad*, however, petitioners here would not be entitled to punitive damages. The only rule of law under which petitioners suggest that the decision below could be undermined, and punitive damages reinstated, is if "evidence of intentional discrimination sufficient to raise a jury question on liability and compensatory damages is also *necessarily sufficient* to get the issue of punitive damages to the jury." Pet. 29 (emphasis added). Petitioners identify no other basis for finding malice or reckless indifference, and the Fourth Circuit evidently could perceive none.

But not even the petitioner in *Kolstad* advances so radical a position. To the contrary, the *Kolstad* petitioner recognizes that "not every case of intentional discrimination will involve reckless indifference." No. 98-208, Pet. Br. 43. The government agrees: "[A] finding of intentional discrimination, without more, does not automatically make a plaintiff eligible to receive punitive damages." No. 98-208, U.S. & EEOC Br. 10.[11]

---

[11] The government recognized that, in the Fourth Circuit, as else-

Because *Kolstad* will not turn on whether every case of intentional discrimination supports an award of punitive damages, it will not impair the validity of the judgment below.

Moreover, the Fourth Circuit's use of the term "particularly egregious," relied on by petitioners (Pet. 28), is in context no more than shorthand for a showing of "malice or reckless indifference." See Pet. App. 39a. The "malice or reckless indifference" standard itself reflects a higher standard of culpability than is necessary to impose liability for compensatory damages alone under the *McDonnell Douglas* scheme of shifting presumptions. Indeed, this Court has recognized in the civil rights context that punitive damages are intended to punish and deter only "extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); see *id.* at 267 n.29 (reserving punitive damages under 42 U.S.C. § 1983 for an "outrageous abuse of constitutional rights"). The Court has explained further that the punitive damages inquiry should "focus * * * on the *character of the tortfeasor's conduct* — whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith* v. *Wade*, 461 U.S. 30, 54 (1983) (emphasis added).

Such distinctions are particularly apt in the context of the discrimination laws, where a finding of discrimination may rest on the generous presumptions of the *McDonnell Douglas* framework. The conduct underlying the imposition of punitive damages on Circuit City was its failure to promote Lowery to a position as supervisor and Peterson twice to the same FNANB assistant supervisor position. Except for whatever may be gleaned from the conduct itself, there is nothing in the record sufficient to prove malice or reckless indifference relating to

---

where, "demonstrating egregiousness is only one of many available means of proving that the standard set by Congress for punitive damages liability has been satisfied." No. 98-208, U.S. & EEOC Br. 11 & n.8 (citing *Harris* v. *L&L Wings, Inc.*, 132 F.3d 978, 983 (4th Cir. 1997)). There simply was nothing else to go on here.

those promotions. Rather, liability appears to rest on the jury's second-guessing the relative qualifications of the two petitioners and the women promoted instead, despite petitioners' "problems that, at least partially, led to their being passed up for promotion." Pet. App. 40a. In fact, the jury sustained Circuit City's promotion choices against two of Lowery's three challenges, and against eight of Peterson's ten attacks. Even if liability may hang by so slender a thread under *McDonnell Douglas*, the Fourth Circuit surely was correct that such second-guessing was not an "appropriate" basis for "submit[ting] the issue of punitive damages to the jury." *Ibid.* This case is a poor vehicle for drawing fine lines on the topic, especially because the common law principles governing punitive damage awards under Section 1981 reflect a threshold for punishment that, if at all different, is higher than the standard spelled out in Section 1981a.

The punitive damages award in this case was unsound for another reason — one that makes this case still less appropriate for further review or delay. The district court instructed the jury that "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability for punitive damages." C.A. App. 3121. That charge effectively directed a verdict of punitive liability upon any finding of discrimination by suggesting that the jury otherwise would undermine the civil rights laws.

Because the punitive damages awards are not sustainable under any plausible standard, the grant of certiorari in *Kolstad* provides no basis for delaying final disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Of Counsel:

W. STEPHEN CANNON
PAMELA G. PARSONS
TERI C. MILES
Circuit City Stores, Inc.
9954 Mayland Drive
Richmond, Virginia 23233
(804) 527-4000

ANDREW L. FREY*
KENNETH S. GELLER
DONALD M. FALK
MARK S. DAVIES
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

**Counsel of Record*

FEBRUARY 1999